SHORT FORM ORDER

INDEX No. 10-25363
CAL No. 12-01584MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-5-12
Mot. Seq. # 001 - MD

---X

ANGELICA DIAZ,

Plaintiff,

- against -

STEPHEN J. MORIARTY,

Defendant.

---X

CANNON & ACOSTA, LLP
Attorney for Plaintiff
1923 New York Avenue
Huntington Station, New York 11746

MCCABE, COLLINS, MCGEOUGH, & FOWLER, LLP
Attorney for Defendant
346 Westbury Avenue, P.O. Box 9000
Carle Place, New York 11514

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant dated October 17, 2012 , and supporting papers numbered 1-10 (including Memorandum of Law dated none); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated November 26, 2012 , and supporting papers 11-14; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other __ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by the defendant, Stephen J. Moriarty, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him on the issue of liability and on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this negligence action, the plaintiff, Angelica Diaz, alleges that she sustained serious personal injury as a result of an accident which occurred on November 13, 2009, 5th Avenue/NB Union Blvd., in Bay Shore, New York when her vehicle and the vehicle operated by the defendant, Stephen J. Moriarty, collided in the intersection.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The

movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; a certified transcript of the examination before trial of plaintiff; the unsigned transcript of the non-party witness, Sidonie L. Orelus, which is not in admissible form as the defendant has not demonstrated that although the transcript was forwarded to the non-party witness, the non-party witness failed to sign it and return it, and that no changes were made (***Franzese v Tnager Factory Outlet Centers, Inc.***, 88 AD3d 763, 9930 NYS2d 900 [2d Dept 2011]), and is thus not considered; the uncertified copy of the MV 104 Police Accident Report, likewise is not admissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); and the sworn report of Michael J. Katz, M.D. concerning his independent orthopedic evaluation of the plaintiff February 21, 2012.

It is noted that the defendant has not submitted either an affidavit or a copy of his deposition transcript in support of this application as it relates to liability, rendering that part of the defendant's application on the issue of liability insufficient as a matter of law. It is well settled that upon motion for summary judgment, the supporting affidavits must be made by affiants having personal knowledge. Hearsay statements by attorneys having no personal knowledge are of no effect (***Friends of Animal v Associated Fur Mfrs.*** *supra*; ***Mastro v Mastro***, 112 AD2d 203, 491 NYS2d 424 [2d Dept 1985]). ***Central School District No. 2 of the Town of Oyster Bay v Cohen***, 60 Misc 2d 337, 302 NYS2d 398 [Dist. Ct., Nassau County 1960]). It is also determined that even if the deposition transcript of the non-party witness Sidonie L. Orelus were considered, it raises a triable issue of fact and credibility issues concerning whether the plaintiff or the defendant had the green light to travel through the intersection while traveling in their respective direction of travel through the intersection.

Angelica Diaz testified to the extent that the accident occurred on 5th Avenue and Union Blvd. in the intersection. She was traveling on Union Blvd. which she described as having two travel lanes, one in each direction, governed by a traffic signal device, which she first saw when she was about ten car lengths from the intersection. The traffic light was green for her travel direction. She was just under the light when the accident occurred. It was her intention to continue straight through the intersection. She was traveling about twenty-five miles per hour. There were three vehicles involved in the accident, but only the defendant's vehicle came into contact with her car. She stated that the defendant's vehicle came out of nowhere and struck the right front of her vehicle. There was one impact to her vehicle.

Based upon the foregoing, even if the defendant's application were supported with his deposition transcript or affidavit, and even if the non-party deposition were considered, the defendant, Stephen J. Moriarty, has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the issue of liability.

Turning to the branch of the defendant's application wherein he seeks summary judgment on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), it is determined that the defendant has failed to establish prima facie entitlement on this issue as well.

Pursuant to Insurance Law § 5102(d), "'[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1 st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of her verified bill of particulars, the plaintiff, Angelica Diaz, alleges that as a result of this accident she sustained injuries consisting of T11-T12 disc herniation; L4-5 disc herniation with thecal sac impingement; cervical and lumbar radiculopathy, lumbar scoliosis, exaggerated lumbar lordosis; and left knee contusion.

The report of Dr. Katz is not supported with a copy of his curriculum vitae to qualify him as an expert herein. Although Dr. Katz has set forth the records and materials which he reviewed in rendering his opinion in part, none of those medical records have been provided with the moving papers, leaving this court to speculate as to the contents of those materials, and in contravention of the requirements of CPLR 3212 (see ***Friends of Animals v Associated Fur Mfrs***., supra. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which facts are not in evidence. Dr. Katz does not address the plaintiff's claim of herniated discs and does not rule out that they are not causally related to the subject accident, leaving this court to speculate on this issue as well.

Although the plaintiff has claimed cervical and lumbar radiculitis in her bill of particulars, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out the claimed neurological injury (see ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus precluding summary judgment on that basis as well.

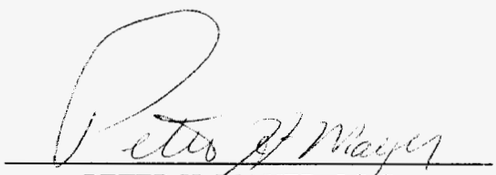
It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). As a result of the impact, she suffered pain in her neck, left knee, and back. She also developed pain in her left ankle. She treated with Dr. Martin for about six months, two to three times a week, for chiropractic care and treatment. She received acupuncture to her lower back, neck, left knee and ankle, and massage therapy for her knee injury. She was confined to her home for about three weeks. After an MRI of her back was conducted, Dr. Martin advised her that she had a herniated disc in her back. She had been previously involved in an accident five years prior, and sustained injury to her neck, but no longer had pain associated with that accident at the time of the subject accident. As a result of this accident, she experiences pain in her lower back, especially when lifting a patient, as she works as a nurse's aid. At work, she now needs help lifting patients, taking patients to the bathroom, and assistance with everything she does with her patients. Aside from lifting, she has difficulty moving furniture, cleaning, and chasing and lifting her three young children. She has difficulty doing grocery shopping. The pain in her left knee occurs mainly when it is really cold outside. She had modified her gym activity. Prior to the accident, she went to the gym five days a week. After the accident, she only went to the gym one or two times, and now she no longer goes.

Based upon the foregoing, the defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury under either category of Insurance Law § 5102 (d).

The factual issues raised in defendants' moving papers preclude summary judgment. The defendant has failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint is denied in its entirety.

Dated: 1/24/13



PETER H. MAYER, J.S.C.